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# **In the Supreme Court**

OF THE

**United States**

**OCTOBER TERM, 1971**

**No.**

**KIRBY J. HENSLEY, *Petitioner,***

**vs.**

**MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL  
DISTRICT, SANTA CLARA COUNTY,  
STATE OF CALIFORNIA,  
*Respondent.***

**RESPONSE IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

## **OPINIONS BELOW**

The decision of the United States District Court for the Northern District of California denying petition for writ of habeas corpus is unreported and is reproduced at Appendix A of Petition for writ of certiorari at 1a. The District Court's order denying reconsideration but granting certificate of probable cause is also unreported. *Ibid.*, Pet. B at 2a.

The decision of the United States Court of Appeals for the Ninth Circuit is officially reported at 453 F.2d 1252, *Ibid.*, Pet. C at 3a. On February 18, 1972, the

Court of Appeals denied a petition for rehearing and rejected the suggestion for rehearing en banc, Ibid., Pet. D at 5a.

### **JURISDICTION**

The jurisdiction of this court is invoked under Title 28, United States Code Section 1254(1).

### **QUESTION PRESENTED**

Whether or not a person released on his own recognizance following trial, conviction, and imposition of sentence, but before execution of said sentence on a state criminal charge, is within the purview of 28 U.S.C. Section 2241(c)(3), which extends the remedy of habeas corpus to persons "in custody" in violation of the Constitution of the United States.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Article I, Section 9, of the Constitution of the United States provides, in pertinent part:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

28 U.S.C. Sec. 2241:

"Power to grant writ:

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(3) He is in custody in violation of the Constitution . . . of the United States;"

28 U.S.C. Sec. 2254:

"State custody; remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States."

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#### STATEMENT OF THE CASE

Petitioner, Kirby J. Hensley, was convicted of a misdemeanor on June 25, 1969. Thereafter on July 1, 1969, Hensley was sentenced to one year in jail plus \$625 fine for his violation of Section 29007 of the California Education Code. Since that time, he has been at liberty on his own recognizance.

The District Court did not reach the substantive issues raised in the petition for writ of habeas corpus filed with it, but denied the petition on the basis that the court lacked jurisdiction over the matter citing the controlling decision of *Matysek v. United States*, 339 F.2d 389 (Ninth Circuit 1964); holding that the custody requirement of 28 U.S.C. Sec. 2241(c)(3) is not met by one at liberty on his own recognizance.

The Court of Appeals affirmed, relying on its previous holding in *Matysek v. United States*, *supra*.



### ARGUMENT

THE DECISION BELOW WAS IN ACCORD WITH EXISTING LAW REQUIRING STATE PRISONERS TO BE "IN CUSTODY" TO QUALIFY FOR FEDERAL HABEAS CORPUS.

The statutory prerequisites of a state prisoner being "in custody" to qualify for federal habeas corpus pursuant to 28 U.S.C. 2241(c)(3) have been broadened by decisions of various federal courts.

The term "in custody" has been pulled and stretched to cover more and more applicants not previously under the protective umbrella of federal habeas corpus. In that pulling and stretching of "in custody" a single fiber has remained unaltered; namely, that the applicant must be under some form of restraint. The gamut of the forms of restraint that have been considered range from actual detention<sup>1</sup> to parole<sup>2</sup> to the disability of a prior felony conviction.<sup>3</sup>

The breadth of restraints has not been so broad as to include the minor intrusion resulting from a release on one's own recognizance.

The cases cited by the petitioner deal with situations where the applicant was suffering from restraint or disability not suffered by the public at large that would make him eligible for habeas corpus.

<sup>1</sup>As this court said in *McNally v. Hill*, 293 U.S. 131, 136 (1934), "This court has consistently refused to review upon habeas corpus questions which do not concern the lawfulness of the detention".

<sup>2</sup>*Jones v. Cunningham*, 371 U.S. 236, 243, 1963 [Parole] imposes conditions which significantly confine and restrain his [petitioner's] freedom; this is enough to keep him in the "custody" of the Virginia Parole Board within the meaning of the habeas corpus statute.

<sup>3</sup>*Carsaf v. La Vallee*, 391 U.S. 234, 238 (1968).

**CONCLUSION**

The purpose of the writ of habeas corpus is to provide a prompt and effective remedy for whatever society deems to be intolerable restraints. *Fay v. Noya*, 372 U.S. 391, 401 (1963).

In the three years since his conviction, the petitioner has moved freely and unrestrained. The extraordinary circumstances requiring the invocation of the writ of habeas corpus do not exist as to this petitioner. Were this court to grant such relief, it would vitiate the statutory requirements provided for federal habeas corpus, and convert the writ of habeas corpus into a writ of error.

The decision of the Court of Appeals should be affirmed by the denial of certiorari.

Dated, San Jose, California,

July 10, 1972.

Respectfully submitted,

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